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No. 96-581

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOHN W. OVERMYER & ELIZABETH OVERMYER,

*Petitioners,*

*v.*

IVAN MEEKER, EXECUTOR OF THE ESTATE OF ARTHUR C. MEEKER, DECEASED; NATIONAL CITY BANK, INDIANA, CROP FERTILITY SPECIALISTS, KERLIN ELEVATOR, and LINCOLN NATIONAL LIFE INSURANCE CO.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FOURTH DISTRICT

DONALD J. TRIBBETT
*(Counsel of Record)*
SCOTT L. STARR
201 S. Third Street
P.O. Box 120
Logansport, Indiana 46947
(219) 722-6676

*Attorneys for Respondent, NATIONAL CITY BANK, formerly known as FIRST NATIONAL BANK OF LOGANSPORT.*

*Of Counsel:*
STARR AUSTEN
TRIBBETT & MYERS

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No. 96-581

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOHN W. OVERMYER & ELIZABETH OVERMYER,

*Petitioners,*

*v.*

IVAN MEEKER, EXECUTOR OF THE ESTATE OF ARTHUR C. MEEKER, DECEASED; NATIONAL CITY BANK, INDIANA, CROP FERTILITY SPECIALISTS, KERLIN ELEVATOR, and LINCOLN NATIONAL LIFE INSURANCE CO.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FOURTH DISTRICT

Respondent National City Bank (formerly known as "First National Bank of Logansport" and hereafter referred to as "FNBL") respectfully requests that this Court dismiss or deny Petition for Writ of Certiorari submitted by Petitioners John W. Overmyer and Elizabeth Overmyer (hereafter "Overmyers"). FNBL files this brief in opposition to the Petition for Writ of Certiorari.

## I. STATEMENT OF THE CASE

This appeal arises out of the closing of the insolvent Estate of Arthur C. Meeker. This is the second appeal arising from that proceeding. The first appeal involved the same petitioners filing the instant Petition for Writ of Certiorari and resulted in the Indiana Court of Appeals' issuance of an earlier opinion in *Lincoln National Life Insurance Co. v. Overmyer,* 530 N.E.2d 784 (Ind.Ct.App. 1988).

The Estate of Arthur C. Meeker was opened April 15, 1985. (Record 1) Following the opening of the Estate, numerous creditors filed claims and took other actions in an attempt to collect sums due them from the decedent. (Record 1-6) Claims filed by Lincoln National Life Insurance Company (hereafter "Lincoln") and your present petitioners, Overmyers, are described in *Lincoln National, supra* at 785. As noted in that opinion, Overmyers' claim arose out of their sale of farm real estate to the decedent, Arthur C. Meeker, pursuant to a land contract.[1] Prior to Meeker's death, Overmyers agreed to deed that farm (hereafter referred to as "the Overmyer farm") to Meeker to enable Meeker to obtain a loan from Lincoln secured by the Overmyer farm. Overmyers were paid $600,000.00 cash from the loan proceeds, but an unpaid balance remained; Meeker died without having paid that balance to Overmyers.

After Meeker's death, Overmyers and Lincoln disputed the priority of their claims to security in the Overmyer farm. Overmyers claimed a vendor's lien over the Overmyer farm, and Lincoln asserted a mortgage lien.

[1] That land contract was not part of the record below even though it was the basis of Overmyers' assertion of a vendor's lien in this proceeding.

That dispute resulted in the *Lincoln National* opinion which, in substance, held that Lincoln's mortgage held priority over Overmyers' vendor's lien on the Overmyer farm. As to the Overmyers' lien, the Court held:

> "[T]he Overmyers waived their vendor's lien *'to the extent of the mortgage made' to Lincoln.* The Overmyers' vendor's lien, though not lost, attached only to Meeker's equity of redemption and any surplus remaining from the proceeds of the mortgage foreclosure sale after the proceeds have been applied in discharge of Lincoln's mortgage lien."

*Id.* at 787.

The Court of Appeals remanded the matter for further proceedings consistent with its opinion. On November 15, 1989, the lower court entered its Final Judgment and Decree of Foreclosure and Sale; that decree awarded Lincoln a first-lien and judgment for $2,575,387.26 and ordered a sale of the Overmyer farm. (Record 133-141) On January 9, 1990, the Sheriff of White County sold the farm resulting in only a partial satisfaction of Lincoln's judgment to the extent of $1,299,619.00. (Record 142-143)

On March 13, 1992, Overmyers agreed to a judgment allowing its claim in the estate in the amount of $250,000.00. (Record 60-A)

Not included in the appellate record is the claim of FNBL and most of the pleadings filed in the civil docket to which FNBL's claim was assigned. (*See,* footnote 5, *infra,* for a description of the Indiana procedure relative to filing of claims and assignment to an "issues docket.") However, pleadings which have been included reveal that FNBL filed its claim on September 4, 1985, in the amount of $1,418,202.34, plus interest accruing thereafter, and that a settlement approved on July 17, 1992,

resulted in the approval of FNBL's claim in the amount of $1,397,122.52.

In the meantime, the personal representative and the attorney for the Arthur C. Meeker Estate filed their petition requesting an allowance of attorney fees and executor fees. (Record 4)[2] At a June 4, 1992, hearing, Overmyers conceded that the proposed fees were reasonable but argued that, with regard to the assets available for payment of fees, their claim was entitled to priority over fees. (Record 237-242, 257-265) Overmyers' argument was based on the premise that they still had a vendor's lien on the proceeds of any income earned from the Overmyer farm previously sold at sheriff's sale. The amount at issue appeared to be approximately $80,000.00, which, according to Overmyers, was the amount allegedly earned on the Overmyer farm the first growing season after Arthur C. Meeker's death. (Record 259) The only evidence offered by Overmyers in support was the testimony of Ivan Meeker, the personal representative of the Estate. (Record 242-252) Overmyers did not tender, and were not prohibited from introducing, any other evidence.

On June 29, 1992, the court denied Overmyers' claim that they had a vendor's lien giving them priority over the attorney and executor fees. (Record 69-72) The court found that income earned off the Overmyer farm after the decedent's death had been made a part of the general assets of the Estate. (Record 69-70) The court also held that Overmyers could not claim a vendor's lien with regard to those earnings because the Court of Appeals in

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[2]That petition is not included in the record. The record citation is to a Chronological Case Summary which shows the filing of the petition without showing its particulars.

*Lincoln National, supra,* had limited Overmyers' vendor's lien to the equity of redemption and the surplus from the sheriff's sale; since the right of redemption no longer existed, and since there was no surplus from the sheriff's sale, the court reasoned that there were no assets to which Overmyers' vendor's lien could attach. (Record 70-71)

On April 20, 1994, the personal representative filed Petition to Close Estate as Insolvent. (Record 99) In an attached accounting, the personal representative showed a balance, after expenditures, of $50,826.06 and proposed distributing that balance on a pro rata basis among three claimants whose claims totalled $1,685,-191.12.[3]

After the filing of Petition to Close Estate as Insolvent, Overmyers filed four pleadings objecting or otherwise responding to the substantive provisions of that petition. Those pleadings were as follows:

(1) Objections to Petition to Close Estate and Accounting of Executor filed April 22, 1994, in which Overmyers argued that they were entitled to a "specific lien" arising as a result of the contract with the decedent for the sale of the Overmyer farm. (Record 105-108) The Overmyers further asserted that the personal representative of the estate had earned income off the Overmyer farm but had not paid that money to Overmyers pursuant to their "specific lien" but had placed that income in the estate account. To the extent that the personal

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[3]It was subsequently acknowledged that the personal representative had omitted the $250,000.00 claim of the Overmyers, and it was agreed and ordered that the Overmyers' claim should be added to the other three claims with the $50,826.06 then being distributed on a pro rata basis to the four claimants. (Record 163, 193, 222-224).

representative proposed to distribute that income to others, or to obtain approval for payments already made from that income, Overmyers objected to the accounting alleging their "specific lien for purchase money takes priority." This pleading did not otherwise object to the petition to close.

(2) Overmyers' Petition for Executor to Account for Rents and Profits filed June 24, 1994, in which Overmyers asserted a "vendor's lien" with regard to the income from the Overmyer farm. (Record 128-143) The petition requested that the personal representative be required to account for that income.[4] Otherwise, this pleading did not raise issues relative to the personal representative's accounting.

(3) John W. Overmyer's and Elizabeth Overmyer's Further Objection to Accounting filed July 1, 1994, in which Overmyers objected to an expenditure to FNBL to the extent that the money paid to FNBL came from "income derived from the . . . real estate subject to Overmyers' lien." (Record 153) Once again the Overmyers did not otherwise object to the claim of FNBL or payments made to FNBL.

(4) Overmyers' Reply to Executor's Brief filed September 15, 1994. (Record 209) In their reply, Overmyers contended that the rents, issues, and profits generated from the Overmyer farm were included within the equity of redemption as discussed by the Court of Appeals in *Lincoln National, supra.*

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[4] In their June 24, 1994, pleading Overmyers referred to "surplus" income retained by the personal representative after accounting to Lincoln for the rest of the income. (R. 130, paragraph 5) It is impossible to determine from the record that any surplus income existed. Since Lincoln's first lien on the Overmyer farm was in the amount of $2,575,387.26 (R. 136), and since Lincoln realized only $1,299,619.00 from the sale of the real estate (R. 143), a surplus of any sort is not apparent.

In addition, on July 13, 1994, Overmyers filed their Petition for the Court to Marshall Assets in which they once again asserted a vendor's lien and, in effect, asked the court to enforce that lien with regard to income earned on the Overmyer farm. (Record 177-178)

On September 19, 1994, a hearing was conducted regarding the petition to close the estate and all related matters. (Record 304-382) At that hearing Overmyers proposed to produce as evidence the testimony of the executor; the Estate and FNBL argued that the Overmyers' vendor's lien claim presented only a legal argument and that the introduction of evidence was unwarranted. Overmyers conceded that the court had already heard their arguments and evidence and ruled against them on June 29, 1992 (*i.e.* the order denying Overmyers' claim to priority over the claims for administrative fees). (Record 328) The court concluded that a legal issue was presented and that evidence was unnecessary and would be a waste of time. (Record 352, 380)

On October 6, 1994, the court entered its order granting the Petition to Close Estate as Insolvent and ruled against all of Overmyers' pleadings asserting a vendor's lien giving them priority to assets of the Estate. (Record 222-224) A second appeal to the Indiana Court of Appeals followed. It is from this second appeal that certiorari is sought.

In their brief filed in the Court of Appeals, Overmyers stated only two issues as follows:

> "*Issue I*: Is the trial court's interlocutory order that Overmyers are unsecured creditors, having no specific lien rights in cash assets of the estate, contrary to the law of the case established by *Lincoln v. Overmyer*?

> *Issue II*: Did the probate court, by refusing to hear evidence concerning the source of cash assets of the estate, fail to perform its duty to correct possible errors in the executor's final report, and thus, fail to fulfill its responsibility of properly designating the creditors and amounts to whom distribution of the estate should be made?"

Neither the body of the brief nor the Table of Cases, Statutes & Authorities included in Overmyers' brief (a copy of which is attached as an Appendix) made any citation to the United States Constitution or any federal statute or case.

On March 6, 1993, the Indiana Court of Appeals issued its opinion which is the subject of the instant petition. That opinion was issued in the case of *Overmyer v. Meeker,* 661 N.E.2d 1271 (Ind.Ct.App. 1996). That opinion neither identified nor discussed any federal issue.

Overmyers then filed their petition to transfer to the Indiana Supreme Court and a supporting brief. In the petition and brief, Overmyers, for the first time, made reference to "the Fourteenth Amendment's Due Process Clause" and contended that it prevented the trial court from denying litigants use of the adjudicatory process. However, no question was raised with regard to the validity of any state statute. On July 2, 1996, the petition to transfer was denied.

## II. ARGUMENT

### A. This Court Lacks Jurisdiction Over Issues Raised For The First Time In A Petition For Writ Of Certiorari.

Overmyers' Petition for Writ of Certiorari poses two questions for review. Both question the statutory scheme for settling insolvent estates. The petition's reference to Constitutional Provisions and Statutes Involved in the Case makes clear that the statutory scheme being questioned is contained in Ind. Code §§29-1-8-8 and 29-1-16-6(c). Neither question now raised has been previously raised or discussed by the Indiana courts. At no time have Overmyers previously raised any question whatsoever regarding the validity of any Indiana statute.

Failure to raise federal issues in the state court proceeding leaves this Court without jurisdiction to consider those issues on certiorari. *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969). As stated in *Illinois v. Gates*, 462 U.S. 213, 217-218, 103 S.Ct. 2317, 2321-2322, 76 L.Ed.2d 527 (1983), certiorari jurisdiction lies only where the federal issue has been "both raised and decided in the state court." Failure to apply that rule may result in the Court considering a matter where a proper record has not been made.

Overmyers' Petition for Writ of Certiorari does not even pretend that these issues were properly raised or preserved in state court. On page 2 of their petition, Overmyers cite, as their sole example of their raising the issues in state court, their counsel's statement before the trial court that "Mr. and Mrs. Overmyers' due process rights are denied by me being denied the right to examine a party in this case." That isolated statement is insuffi-

cient to preserve the issues Overmyers now seek to raise for several reasons.

First, their counsel's statement does not specify whether he seeks to raise a federal issue or a due process issue under Article 1, §12 or §21 of the Constitution of Indiana. When such a vague reference to constitutional guarantees is made, it is presumed that the references are to state constitutional provisions; no federal question is raised. *Webb, supra* at 496-497, 101 S.Ct. at 1891-92; *Bowe v. Scott,* 233 U.S. 658 (1914).

Second, the quoted comments by counsel do not amount to a claim that any statute is constitutionally defective. Overmyers do not make any reference in their petition to any raising in the state courts of the issues they now raise. Clearly, the Overmyers did not make the explicit and timely insistence that a state statute is unconstitutional as required for certiorari jurisdiction. *Raley v. Ohio,* 360 U.S. 423, 435, 79 S.Ct. 1257, 1264 (1959).

Finally, Overmyers' Petition for Writ of Certiorari does not even pretend that they preserved any federal issue before the Indiana Court of Appeals. A review of the Indiana Court of Appeals' opinion reveals no discussion regarding the constitutionality of IND. CODE §29-1-8-8 or IND. CODE §29-1-16-6(c). That results in the presumption that the matter was not properly raised in the state court. *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969). As previously noted, Overmyers did not recite to that court any federal issue. They also relied on no federal authority. The failure to assign the federal issue as error on appeal results in a waiver of that issue. *Beck v. Washington,* 369 U.S. 541, 82 S.Ct. 955 (1962).

In short, Overmyers seek to raise issues for the first time in an effort to obtain certiorari. This they may not do, and their petition should be dismissed.

### B. This Court Lacks Jurisdiction Because Adequate And Independent State Grounds Exist To Support The State Court Judgment.

The trial court and Indiana Court of Appeals determined that Overmyers were not entitled to present evidence at the hearing on the final accounting of the Estate because applicable state law made the issues Overmyers attempted to present questions of law rather than questions of fact. State law principles expressly or impliedly involved in the state court decisions were: (1) the law of the case doctrine; (2) the extinguishment of a vendor's lien through a sheriff's sale of the property on which a lien is held; and, (3) waiver of issues not presented to a trial court.

The entire thrust of the Overmyers' argument before the trial court was that their vendor's lien entitled them to priority with regard to income earned from the Overmyer farm. The trial court determined, and the Court of Appeals affirmed, that the case of *Lincoln National Life Insurance Co. v. Overmyer, supra,* limited Overmyers' vendor's lien to Meeker's equity of redemption and any surplus remaining from the foreclosure sale. In effect, the *Lincoln National* opinion became the law of the case under the doctrine discussed in *Riggs v. Burell,* 619 N.E.2d 562 (Ind. 1993).

Further, the state courts determined that the vendor's lien had never attached to the income from the Overmyer farm and that the lien was effectively terminated by the foreclosure sale, which ended Meeker's right of

redemption, and by reason of the fact that no surplus resulted from that sale. *See, Federal Land Bank of Louisville v. Schleeter,* 208 Ind. 9, 193 N.E. 378 (1934), *reh'g. den.* 208 Ind. 9, 194 N.E. 628 (1935); *Lincoln National, supra; Patterson v. Grace,* 661 N.E.2d 580 (Ind.Ct.App. 1996); *Vanjani v. Federal Land Bank of Louisville,* 451 N.E.2d 667 (Ind.Ct.App. 1983).

As to Overmyers' claim that they should have been permitted to present evidence at the hearing on the final account, the state courts noted that Overmyers had previously presented evidence on the same issues they raised at the hearing on the final account, but the trial court had decided against them. The law of the case doctrine does not require multiple evidentiary hearings on the same issues. *Riggs, supra.* Also, the Court of Appeals noted that Overmyers had framed their appellate issues such that that court did not need to consider Overmyers' evidentiary hearing issue unless the court determined that Overmyers were secured creditors; since that court decided that Overmyers were unsecured creditors, no consideration of that issue was necessary. *Overmyer v. Meeker, supra* at 1275, n.2.

Finally, the Indiana Court of Appeals correctly applied state law waiver principles relative to Overmyers' attempts on appeal to expand their argument that an evidentiary hearing was erroneously denied by the trial court. Before the trial court, Overmyers asserted a right to present evidence solely to show the alleged validity and effect of their vendor's lien. They made no claim regarding the release of collateral to any other creditor. The appellate record Overmyers furnished to the Indiana Court of Appeals also did not include a transcript of any evidentiary hearings or pleadings in the issues docket for

the claim they sought to challenge for the first time on appeal.[5]

Under Indiana law, a party may not present new theories or raise new issues on appeal. *Fortmeyer v. Summit Bank,* 565 N.E.2d 1118 (Ind.Ct.App. 1991); *Apple v. Kile,* 457 N.E.2d 254 (Ind.Ct.App. 1983). Further, an appellant has an obligation to furnish the appellate court an adequate record to consider issues raised on appeal and may be deemed to waive any issue for which an adequate record is not furnished. *Mid-West Federal Savings Bank v. Epperson,* 579 N.E.2d 124 (Ind.Ct.App. 1991); *Williams v. City of Indianapolis,* 567 N.E.2d 1197 (Ind.-Ct.App. 1991). Thus, there were multiple state law reasons for the Court of Appeals to refuse to consider the new issue Overmyers sought to raise on appeal.

In short, the decisions rendered by the state courts are substantiated on independent and adequate state law grounds. This Court lacks jurisdiction to review on certioari a decision by state courts where adequate and independent grounds for that decision exist under state law. *Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945); *Fox Film Corp. v. Muller,* 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935). Such is the case here, and no jurisdiction exists to grant certiorari.

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[5]Under Indiana practice, the filing of a claim in an estate proceeding generally results in the transfer of that claim to a separate "issues docket." IND. CODE § §29-1-14-10 and 11; *Hubbard v. Hubbard,* 16 Ind. 25 (1861). Although Overmyers decided on appeal to contest matters relative to the claim of FNBL, they did not make any records or transcripts from the issues docket relative to that claim a part of the record. Thus, it was impossible for the appellate court to review matters relative to that claim.

### C. The Issues Raised By Overmyers Do Not Constitute Substantial And Important Public Issues Sufficient To Warrant Certiorari.

To justify a grant of certiorari, the federal issues presented must be important public issues. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

Here, Overmyers seek to challenge a statutory scheme for closing insolvent estates, which, according to Overmyers, does not afford unsecured creditors notice and an opportunity to be heard. What Overmyers ignore is that they were notified of hearings and actually presented their evidence and arguments. In fact, the trial court did not even prevent the Overmyers from presenting evidence or arguments at the hearing on the final account; the Court simply refused to allow the Overmyers to present evidence on matters long since resolved, albeit not to Overmyers' satisfaction. What they really desire is an opportunity to have several bites at the same apple. Worse yet, they want to be given an opportunity to raise issues that they could have raised but did not.

This case is not at all similar to the cases on which the Overmyers rely. The Indiana estate procedure directs that notice of administration of an estate be given to creditors of the decedent. IND. CODE §29-1-7-7. That notice is to be given personally to those creditors whose addresses are known and by publication to those whose addresses are not known. *Id.* The personal representative of the estate has an obligation to exercise reasonable diligence to ascertain the name and address of creditors so that personal notice to those creditors can be made. IND. CODE §29-1-7-7.5. A creditor who wishes to receive notices of all hearings settling accounts of the estate is

permitted to file a pleading requesting same. IND. CODE §29-1-7-6.

Overmyers do not attack the validity of those procedures and apparently received all pleadings and notices, including a notice of the hearing on the final account inasmuch as they were in attendance. Overmyers sole complaint is that the trial court would not permit them to address the same issue more than once. No authority cited by Overmyers questions a statutory procedure like this one, especially where notice is actually received and an opportunity to be heard is provided.

This case does not present any issue of public importance. Assuming, *arguendo*, that the Indiana statutory scheme deserves scrutiny by this Court, this case and this record are not the proper ones in which such scrutiny is appropriate.

## III. CONCLUSION

Petitioners have failed to raise and preserve any federal issue below, and the decisions below were based on adequate and independent state grounds. Therefore, the Petition for Writ of Certiorari should be dismissed. In the alternative that petition should be denied because it fails to raise any substantial and important public issue.

Respectfully submitted,

DONALD J. TRIBBETT
*(Counsel of Record)*
SCOTT L. STARR
STARR AUSTEN
TRIBBETT & MYERS
201 S. Third Street
P.O. Box 120
Logansport, Indiana 46947
(219) 722-6676
*Attorneys for Respondent*
*NATIONAL CITY BANK,*
*formerly known as*
*FIRST NATIONAL BANK*
*OF LOGANSPORT*

November 14, 1996

## APPENDIX

**[Excerpt from
Brief Of Appellants in
The Indiana Court of Appeals]**

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